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**IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA  
OAKLAND DIVISION**

IN RE NATIONAL COLLEGIATE  
ATHLETIC ASSOCIATION ATHLETIC  
GRANT-IN-AID CAP ANTITRUST  
LITIGATION

MDL Docket No. 4:14-md-02541-CW  
Case No. 4:14-cv-02758-CW

**DEFENDANTS' NOTICE OF MOTION  
AND MOTION TO CONTINUE TRIAL  
DATE**

### This Document Relates to:

## ALL ACTIONS

Date: May 22, 2018

Time: 2:30 p.m.

Courtroom: Courtroom 2, 4th Floor  
Before: Hon. Claudia Wilken

1                   **NOTICE OF MOTION TO CONTINUE TRIAL DATE**

2                   TO ALL PARTIES AND THEIR COUNSEL OF RECORD:

3                   PLEASE TAKE NOTICE THAT on May 22, 2018, at 2:30 p.m., in Courtroom 2 of the  
4 above-captioned Court, located at 1301 Clay Street, Oakland, California, Defendants will, and  
5 hereby do, move the Court, pursuant to Northern District of California Civil Local Rule 40-1, to  
6 continue the trial date currently set for December 3, 2018.

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**MOTION TO CONTINUE THE TRIAL DATE**

2 Defendants respectfully request that the Court continue the December 3, 2018 trial date set  
3 in the Court's March 28, 2018 Order. A continuance is necessary to ensure that the NCAA can  
4 continue to be represented by the attorney, Beth A. Wilkinson, who has long been slated to try this  
5 case on the NCAA's behalf. As mentioned at the January 16 hearing before the Court, Ms.  
6 Wilkinson is serving as lead counsel in a trial scheduled to begin on October 9, 2018. That trial has  
7 been on the docket for 14 months and could last up to 8 weeks—in other words, *past* the start date  
8 for the trial in this matter. In addition, Ms. Wilkinson is lead counsel in a criminal trial that will  
9 begin in January 2019. That trial, which was set shortly after the January 16 hearing in this case, is  
10 scheduled to last three months.

11 For these reasons, unless a continuance is granted, there is a serious risk that the NCAA will  
12 be deprived of its chosen counsel at the trial—and there is no question that the NCAA would lack  
13 Ms. Wilkinson’s counsel during pre-trial and post-trial proceedings that are critical to the resolution  
14 of this matter.

15 In further support of this Motion, Defendants state as follows:

16        1. At the January 16, 2018 hearing on the parties' summary judgment and *Daubert* motions,  
17 the Court stated that it was "reluctant to try to set [a trial date]" for this matter based on the Court's  
18 already busy trial schedule for 2018. Decl. of Rakesh Kilaru in Support of Defs' Mot. To Continue  
19 Trial Date ("Kilaru Decl."), Ex. 1, 1/16/2018 Hr'g Tr. at 81:10-16. The Court did mention that  
20 "maybe December" would work for its schedule. *Id.* at 82:20. In response, Ms. Wilkinson explained  
21 that she has "a trial that's set in front of Judge Ramos in the Southern District of New York that  
22 starts in the middle of October" that "certainly . . . wouldn't [settle]" and could be "a six- to eight-  
23 week trial." *Id.* at 83:6-8, 12-13, 23-24. That case is captioned *City of New York and People of the*  
24 *State of New York v. FedEx Ground Package System, Inc.*, 13-cv-9173 (S.D.N.Y.) (the "FedEx  
25 Trial"). Following this exchange, the Court declined to set any trial date, though it did ask the parties  
26 to "think about December for at least some of it." *Id.* at 84:4-5. The Court also suggested during

1 the hearing that it could “divide . . . up” the trial with “a week here, a witness here, another week,  
 2 another witness.” *Id.* at 81:21-22.

3       2. On March 28, 2018, the Court issued an Order setting “a bench trial of no longer than ten  
 4 days” starting on December 3, 2018. ECF No. 804 at 36. Under the Court’s standing pretrial order,  
 5 the parties will have to comply with several important deadlines during late October and November  
 6 2018, including for briefing on “all significant disputed issues of law” (October 16, 2018); trial briefs  
 7 and findings of fact and conclusions of law (October 30, 2018); and the final pretrial conference  
 8 (November 13, 2018).

9       3. Given her first-chair role in the *FedEx* trial,<sup>1</sup> which has been set for more than a year, Ms.  
 10 Wilkinson could very well be unavailable to defend the NCAA at trial unless the current December  
 11 3 date is continued. The State of New York has estimated that the *FedEx* trial could last “three to  
 12 four weeks,” or “maybe . . . longer,”<sup>2</sup> but as Ms. Wilkinson explained at the January 16 hearing, the  
 13 *FedEx* trial could actually last up to two months, *i.e.*, into December, given the complexity of the  
 14 issues in that case. Even if the *FedEx* trial were to conclude earlier, Ms. Wilkinson would have no  
 15 ability to meaningfully participate in any of the pretrial proceedings in this case.

16       4. Further, following the January 16 hearing, a January 2019 trial date was set in *United*  
 17 *States v. Babich, et al.*, 1:16-CR-10343-ADB (D. Mass.) (the “*Babich* Trial”)—a criminal case in  
 18 which Ms. Wilkinson represents Defendant John Kapoor, the founder and Chairman of the Board of  
 19 Insys Therapeutics, Inc. Dr. Kapoor retained Ms. Wilkinson as his lead counsel shortly after he was  
 20 indicted in October 2017.<sup>3</sup> While trial was originally scheduled to begin on October 15, 2018, Dr.  
 21 Kapoor moved to continue the trial to April 2019 to ensure sufficient time to prepare his defense to  
 22 the government’s complicated allegations.<sup>4</sup> The *Babich* Court denied that relief, instead ordering  
 23 that the trial be continued to January 28, 2019, with jury selection starting weeks before. Kilaru

24       <sup>1</sup> See Kilaru Decl., Ex. 2, 11/17/2016 Beth A. Wilkinson Notice of Appearance, *City of New York*  
 25 and *People of the State of New York v. FedEx Ground Package System, Inc.*, 13-cv-9173  
 (S.D.N.Y.) (“*FedEx*”).

26       <sup>2</sup> Kilaru Decl., Ex. 3, 5/25/2017 Hr’g Tr., *FedEx*, at 59:25-60:4.

27       <sup>3</sup> See Kilaru Decl., Ex. 4, 12/11/2017 Order Admitting Beth Wilkinson *Pro Hac Vice*, *United*  
 28 *States v. Babich, et al.*, 1:16-CR-10343-ADB (D. Mass. Jan. 11, 2017) (ECF No. 253) (“*Babich*”).

<sup>4</sup> Kilaru Decl., Ex. 5, Def. Kapoor’s Unopposed Mot. for Continuance, *Babich* (ECF No. 265).

1 Decl., Ex. 6, 1/18/2018 Hr'g Tr., *Babich*, at 13:2-25. Based on the parties' expectations concerning  
 2 the length of this complex case, the *Babich* Court blocked 12 weeks on its calendar (from late  
 3 January through mid-April) for trial. *See id.* at 13:14-25. In arguing the continuance motion to the  
 4 *Babich* Court, Ms. Wilkinson strongly pressed for an April 2019 trial date, but she was unable to  
 5 cite a scheduled trial date in this matter as a further argument in support of that position.

6 5. The *Babich* case is governed by the Speedy Trial Act, and Judge Burroughs not only  
 7 denied a request to continue the trial to April, but made very clear that she will grant no further  
 8 continuances of this criminal trial. *See id.* at 15:25-16:1.

9 6. Trying this case in December would seriously hamper Ms. Wilkinson's representation of  
 10 both the NCAA and Dr. Kapoor. With jury selection starting in the *Babich* Trial in January, Ms.  
 11 Wilkinson would be unable to participate in the post-trial briefing and any other post-trial  
 12 proceedings on behalf of the NCAA. Nor would she be in a position to participate as necessary in  
 13 the preparation of Dr. Kapoor's defense during the critical weeks leading up to his criminal trial.

14 7. That there are other attorneys involved in the defense of this complex matter does not  
 15 change the fact that the NCAA chose *Ms. Wilkinson* to try the case on its behalf. Nor should the  
 16 involvement of other attorneys undermine the NCAA's settled expectation that it would have Ms.  
 17 Wilkinson's counsel in making critical strategic judgments during pre- and post-trial proceedings.  
 18 *See Kaina v. County of Maui*, Cv. No 04-00608 DAE-LEK, 2007 WL 1153829, at \*4 (D. Haw. Apr.  
 19 18, 2007) (granting continuance that "would serve the purpose of protecting Defendants' right to be  
 20 represented by the counsel of their choice," and rejecting argument "that any number of other  
 21 lawyers could be found to represent Defendants" as "of no consequence"); *see also Cole v. U.S. Dist.*  
 22 *Ct.*, 366 F.3d 813, 817 (9th Cir. 2004) ("Parties normally have the right to counsel of their  
 23 choice. . . .").

24 8. Defendants respect the Court's orders and are mindful of its busy docket. But they  
 25 respectfully submit that the most appropriate way to resolve this clear conflict—which implicates  
 26 important interests of the NCAA and its member institutions as well as the constitutional rights of a  
 27 criminal defendant—would be to continue the trial in this matter until June 2019. *See, e.g., Felder*  
 28

1 *v. Puthuff*, C-93-20303-RPA (EAI), 1995 WL 16821, at \*3 (N.D. Cal. Jan. 13, 1995) (granting a  
 2 motion to continue trial date where counsel had an immovable trial conflict in another case).

3       9. This resolution would not unfairly prejudice Plaintiffs. At the January hearing, Plaintiffs'  
 4 counsel did not cite any urgent need for a trial in this matter, which has been pending for several  
 5 years, and instead suggested that the Court set a tentative trial date to help with scheduling possible  
 6 witnesses. *See Kilaru Decl.*, Ex. 1, 1/16/2018 Hr'g Tr. at 82:12-16. Indeed, counsel conceded that  
 7 continuing any date that was set would not be prejudicial, noting: "If the [dates] have to be moved,  
 8 they get moved." *Id.* at 82:15-16.

9       10. This Court's recent Order on summary judgment suggests a final reason that a  
 10 continuance may be warranted. In its Order, the Court (1) concluded that a set of minor rules changes  
 11 since *O'Bannon* are sufficient to justify a second trial on whether there are procompetitive  
 12 justifications for the NCAA's rules, *see* 3/28/18 Order at 12-15, and (2) left open the possibility of  
 13 relying on materials created after the close of discovery, *see id.* at 35, notwithstanding Magistrate  
 14 Judge Cousins' denial of Plaintiffs' request to reopen discovery, *see* ECF 780-1 at 1-2 (Order  
 15 Denying Motion to Reopen Discovery), which this Court affirmed by operation of N.D. Cal. Local  
 16 Rule 72.2. The NCAA disagrees with both of those rulings in the summary judgment Order. But if  
 17 the Court believes that minor rules changes are relevant to the litigation of this case and that the  
 18 record in this case may reopen before trial, it is important to note that the NCAA will continue to  
 19 make rules changes, including as a result of the report and recommendations of the Commission on  
 20 College Basketball, which are anticipated to be issued on April 25, 2018. In October 2017, NCAA  
 21 President Mark Emmert, the NCAA Board of Governors, and the Division I Board formed this  
 22 independent Commission regarding college basketball to improve the integrity of processes and the  
 23 well-being of student athletes.<sup>5</sup> Once the Commission issues its report, the NCAA Boards and  
 24 Leadership have committed to develop and enact rule changes necessary to implement the  
 25 Commission's recommendations, as early as August 2018 and at least before the commencement of  
 26 the 2018 basketball season in November 2018. If, over Defendants' objections, the Court permits

27       5 *See Kilaru Decl.*, Ex. 7, NCAA, *Commission on College Basketball Charter*, NCAA.com (Oct.  
 28 11, 2017), <http://www.ncaa.org/governance/commission-college-basketball-charter>.

1 Plaintiffs to add evidence of these recommendations and rules changes to the record in any way  
 2 (including by having their experts comment on them), a December 2018 trial date would deny  
 3 Defendants a meaningful opportunity to develop a record as to how, if at all, this new evidence  
 4 affects the claims and defenses in this case.

5       11. For the foregoing reasons, Defendants respectfully request that the Court continue the  
 6 trial date in this matter to no earlier than June 2019, or in the alternative, schedule a status conference  
 7 to discuss a new trial date.

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9       Dated: April 6, 2018

10      **WILKINSON WALSH + ESKOVITZ LLP**

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By: /s/ Beth A. Wilkinson

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Respectfully submitted.

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8 **FILER'S ATTESTATION**

9 I, Beth A. Wilkinson, am the ECF user whose identification and password are being used to  
10 file the Motion for Supplemental Briefing. In compliance with Local Rule 5-1(i)(3), I hereby attest  
11 that all signatories hereto concur in this filing.

12 /s/ Beth A. Wilkinson

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